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No. 294

In the

Supreme Court of the United States

October Term, 1963

CATHERINE CLINTON,

Petitioner

v.

COMMONWEALTH OF VIRGINIA,

Respondent

BRIEF ON BEHALF OF RESPONDENT

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BRIEF ON BEHALF OF RESPONDENT

OPINION BELOW

The conviction of the petitioner (hereinafter sometimes referred to as defendant) was affirmed by the Supreme Court of Appeals of Virginia, as shown by the opinion of that Court reported in the case of *Clinton* v. *Commonwealth*, 204 Va. 275, 130 S. E. (2d) 437. The judgment was entered on April 22, 1963.

QUESTIONS PRESENTED

1. Whether evidence obtained through the use of a microphone (an electronic device) in the absence of a physical invasion of the petitioner's apartment is admissible against the petitioner in a State court.

2. Whether the alleged search of the petitioner's apartment by electronic means was an unreasonable search condemned by the Fourth Amendment.

3. Whether *all* evidence obtained by the use of electronic means should be excluded in a criminal prosecution.

4. Whether the lessee of an apartment rented for the sole purpose of maintaining a house of prostitution (in violation of the State law) is entitled to protection of the Fourth Amendment to the Constitution of the Untied States.

5. Whether a judgment or conviction in a State court should be reversed where there is no reasonable possibility that the evidence complained of might have contributed to the conviction.

CONSTITUTIONAL PROVISIONS ALLEGEDLY INVOLVED

The petitioner contends that the provisions of the Fourth and Fifth Amendments to the Constitution of the United States have been violated.

The respondent denies this.

STATEMENT OF THE CASE

The petitioner was found guilty under a two count indictment of the violation of:

(1) Section 18.1-208, Code of Virginia (1950) as amended, knowingly receiving money from the earnings of a female engaged in prostitution; and

(2) Section 18.1-205 of said Code, unlawfully placing a female in a house of prostitution with the intent that she should live the life of a prostitute.

These sections of the Virginia Code are set forth in the appendix to this brief.

The convictions were rendered in the Corporation Court of the City of Norfolk on February 26, 1962. There was no opinion rendered by the Judge of that Court and there is no requirement that the trial court make specific findings and render opinions.

As the petitioner apparently takes the position that the conversations of the occupants of Apartment 103 (rented to the petitioner and her husband) which were overheard by Officer Beach by means of a microphone were essential to the establishment of the Commonwealth's case, it is well to point out that this is not correct. The testimony of Katherine Taylor, Helen Buckridge and S. N. Edwards independently from that of Officer Beach established the guilt of the petitioner.

The fact that the petitioner had given a false name in registering or in renting the apartment (No. 103) led to suspicion by the police authorities that there may be something wrong about her activities. These suspicions were heightened after the surveillance undertaken by Officer Beach on October 21, 1961, from a point on the street, which indicated a heavy traffic of males and females entering the apartment. Again, on October 23, 1961, the surveillance of the apartment was continued, this time from the adjoining apartment (No. 102). Surveillance from this point continued on October 24 and 25, the petitioner being arrested on the latter date.

The following is a resume of the evidence:

The petitioner, Catherine Clinton, sometimes hereinafter referred to as defendant, on several occasions talked to Katherine Taylor and Helen Buckridge about working for her as prostitutes. The two women agreed to work as

prostitutes for the defendant; they were to pay the defendant one-half of what they took in as the defendant would furnish the apartment and the customers.

The petitioner first resided on Olney Road, and later on Sewell Point Road, Norfolk Virginia. She and her husband, Harley Clinton, posed as Mr. and Mrs. Charles Morrison and during October 1961, rented the apartment (No. 103) at 9630 First View Street, Norfolk, Virginia, for the purpose of prostitution. The petitioner forged the name of Mr. and Mrs. Charles Morrison on the registration slip and made the rent payments (R. 7, 8). Katherine Taylor and Helen Buckridge both worked in the petitioner's apartment as prostitutes and gave one-half of their earnings to the petitioner for furnishing the apartment and the customers.

Officer Earl H. Beach of the Norfolk Police Division and fellow police officers were able to keep surveillance on the apartment for several days and by being in the adjoining apartment they were able to observe many male visitors to the petitioner's apartment who remained for a short time. Officer Beach heard much of the conversation and activity that took place in the petitioner's apartment by listening through a medicine cabinet in the bathroom wall. He also used a device that would amplify sounds and used this device on the wall separating the two apartments. It did not penetrate the petitioner's wall. Officer Beach was able to hear the defendant making various arrangements concerning the operation of her house of prostitution. Officer Beach was able to see everyone who entered and left the defendant's apartment. He was also able to hear everything that took place within the apartment.

Mr. S. N. Edwards went to the apartment as a customer on October 25, 1961. The defendant was there, along with

Katherine Taylor and Betty Johnson. The petitioner questioned Edwards closely as to where he got the telephone number and who he was. After her interrogation of Edwards, the petitioner left with the Johnson woman and said that she was going to look for a larger place. The petitioner actually went across the street to the parking lot and got into an automobile with her husband and waited.

At this point the police entered the apartment after knocking at the door and identifying themselves (R. 38). Both Katherine Taylor and Edwards were undressed and preparing to have sexual relations with each other (R. 9). The police entered the apartment as they had reasonable grounds to believe that a felony had been committed or was being committed.

The following excerpts from the testimony of Officer Beach embrace the only description of the hearing device and how it was used:

> "MR. WHITEHURST: (R. 31)
> "Q. Answer how you could hear from the apartment.
> "A. Yes, sir. Some of the time I was in the bathroom. From the medicine cabinet, you could hear part of the conversation there and I had a device that would amplify the sounds so that you could hear it in the other room.
>
> "MR. REID: Spiked device?
> "A. Yes, sir; small device."
>
> * * *
>
> "Q. This spike, was it driven in the wall?
> "A. It wasn't driven in.
> "Q. Stuck in the wall?
> "A. Yes, sir.

"Q. In what portion of the apartment was that?

"A. The whole apartment was just one-room efficiency. It would be the wall that was separating the two apartments.

"Q. Was it in the center of the wall, the back of the wall, or what?

"A. No, sir. It would be closer to the front of the house. It would be a little off from the center of the wall."

The record does not disclose a breakdown of the portion of the conversations Officer Beach picked up by means of the hearing device and the portion that he heard through his natural sense of hearing, but the Officer did state definitely that he heard the conversation of the man and woman in the bathroom through the medicine cabinet in his apartment.

The following is a chronological resume of Officer Beach's testimony on October 21, 1961 before he made surveillance from the adjoining apartment and before he used the so-called spiked mike:

1. At 11:10 a.m. a man in a Ford car parked on the Colonial Store lot and looked at No. 9630 First View Street.

2. At approximately the same time a woman, later identified as the defendant, came to the window and waved to the man in the car. The man was later identified as defendant's husband.

3. At 11:35 p.m. (a.m.) a white female (identified as Catherine Taylor) went into 9630 First View Street.

4. At 11:30 a.m. a white male went up to 9630 First View Street.

5. At 1:30 p.m. this man came out [of the apartment].

6. At 12 Noon a white female came out 9630 First View Street and went a half block up the street to a bar. She was identified at Betty Johnson.

7. At 1:30 p.m. a white female (the defendant) came out the apartment and got into an automobile bearing a Virginia license.

8. At 2:15 p.m. Harry Clinton, the defendant's husband, came back and parked his car on the lot and went into the apartment.

9. At 3 p.m. a white male came out the apartment, got into a car and left.

10. At 3:25 p.m. a white male (identified as Harry Clinton, the defendant's husband) came out the apartment, proceeded to the parking lot and got into his car and sat there.

11. At 3:40 p.m. a white female (the defendant) came out the apartment and left with her husband.

ARGUMENT

I.

Evidence Obtained Without Physical Invasion Of Constitutionally Protected Area Is Admissible

A review of the cases decided by this Honorable Court leads to the conclusion that in order to exclude evidence obtained by an unauthorized seizure in violation of the Fourth Amendment, there must be a showing that there has been a physical invasion of the premises.

The Virginia Supreme Court of Appeals concluded that "the record does not show that the eavesdropping was accomplished through 'an unauthorized physical penetration

of the premises occupied by the defendant.'" The decision of the Virginia Court is not in conflict with the views expressed by this Court in *Silverman* v. *United States,* 365 U. S. 505, 5 L. Ed. (2d) 734, but is in accordance therewith. In that case, the evidence clearly showed that the spike attached to the microphone penetrated the party wall sufficiently to make contact with "a heating duct servicing the house occupied by the petitioner thus converting their entire heating system into a conductor of sound." It is manifest from the concurring opinion of Mr. Justice Clark and Mr. Justice Wittaker (365 U. S. 513) that the decision in *Silverman* is based on the premise that there was in fact "an unauthorized physical penetration into petitioner's premises." The majority opinion is of the same purport:

> "It [the decision] is based upon the reality of an actual intrusion into the constitutionally protected area." (365 U. S. 512)

In the case of *Goldman* v. *United States,* 316 U. S. 129, 62 S. Ct. 933, 86 L. Ed. 1322, the Court held that placing a detectophone against an office wall in order to listen to conversations taking place in the office next door did not violate the Fourth Amendment. There, as here, in the case at bar, there was no physical encroachment within the constitutionally protected area. The device used in the case at bar was more akin to the detectophone than the so-called "spiked mike" used in the *Silverman* case. The Court, in that case, refused to re-examine the *Goldman* case but pointed out whether or not there was a physical invasion of the defendant's premises is the vital factor in determining the validity of the evidence thereby secured. If there is an unlawful physical invasion of the defendant's premises in

order to obtain the evidence, then the Fourth Amendment is violated; otherwise not. The Court, in the *Silverman* case, makes clear the distinction between the two cases. We quote from its opinion (365 U. S. 510):

> "The absence of a physical invasion of the petitioner's premises was also a vital factor in the Court's decision in Olmstead v. United States, 277 U. S. 438, 72 L. ed. 944, 48 S. Ct. 564, 66 A.L.R. 376. In holding that the wire-tapping there did not violate the Fourth Amendment, the Court noted that '[t]he insertions were made without trespass upon any property of the defendants. They were made in the basement of the large office building. The taps from house lines were made in the streets near the houses.' 277 U.S., at 457. 'There was no entry of the houses or offices of the defendants.' 277 U.S., at 464. Relying upon these circumstances, the Court reasoned that '[t]he intervening wires are not part of [the defendant's] house or office any more than are the highways along which they are stretched.' 277 U.S. at 465.
>
> "Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office—a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent."

In the case of *United States* v. *Goldman*, 118 F. (2d) 310, 314, the Circuit Court of Appeals for the District of Columbia aptly stated:

> "Nor was any error committed in denying Schulman's motion, in which the Goldman's did not join, to suppress the evidence obtained by government agents by the use of the detectaphone and allowing it to be introduced at the trial. Nothing was obtained as a

result of any secret entry of Schulman's office. No trespass upon his premises in any way helped to obtain the evidence. The situation was legally no different from the use of an amplifier of sound to overhear conversation not otherwise audible to the listener as for instance, the use of a common aid to hearing by a person somewhat deaf. No communication by wire or radio was intercepted to make applicable the provisions of Sec. 605 of the Communications Act of 1934, c. 652, 48 Stat. 1046, 1103, 47 U.S.C.A. § 605, as construed in Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307. There was only an instance of eavesdropping which alone, though an invasion of privacy, is not a violation of a recognized legal right to privacy. Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener or violation of a statutory right to use a means of communication thus made immune from interception. Olmstead v. United States, 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944, 66 A.L.R. 376. Compare, United States v. Feldman, 3 Cir., 104 F.2d 255; and Smith v. United States, 4 Cir., 2 F.2d 715."

In affirming the judgment of the circuit court of appeals in the case of *Goldman* v. *United States,* 316 U. S. 129, 135, in passing on the question of whether the use of the detectaphone by Government agents was in violation of the Fourth Amendment, the Court stated:

"We hold that the use of the detectaphone by Government agents was not a violation of the Fourth Amendment.

"In asking us to hold that the information obtained was obtained in violation of the Fourth Amendment, and that its use at the trial was, therefore, banned by

the Amendment, the petitioners recognize that they must reckon with our decision in Olmstead v. United States, 277 US 438, 72 L ed 944, 48 S Ct 564, 66 ALR 376. They argue that the case may be distinguished. The suggested ground of distinction is that the Olmstead Case dealt with the tapping of telephone wires, and the court adverted to the fact that, in using a telephone, the speaker projects his voice beyond the confines of his home or office and, therefore, assumes the risk that his message may be intercepted. It is urged that where, as in the present case, one talks in his own office, and intends his conversation to be confined within the four walls of the room, he does not intend his voice shall go beyond those walls and it is not to be assumed he takes the risk of someone's use of a delicate detector in the next room. We think, however, the distinction is too nice for practical application of the constitutional guaranty and no reasonable or logical distinction can be drawn between what federal agents did in the present case and state officers did in the Olmstead Case.

"The petitioners ask us, if we are unable to distinguish Olmstead v. United States, to overrule it. This we are unwilling to do."

To say that the use of electronic devices which enable a listener to pick up conversations emanating from adjoining property where there is no physical penetration of the premises (a trespass) occupied by those conversing should be prohibited is not sound. In drawing the line in the *Goldman* and *Silverman* cases, *supra*, as this Court has thereby refused to impose the exclusionary rule where there is no actual physical penetration, is sensible and logical.

Surely, the officer [occupant of the adjoining apartment] violates no law or constitutional provision when he listens with his own ears to conversations emanating from the other

room or apartment and using what he hears as evidence in a criminal prosecution. Does he violate the law if he places his ear against the wall of his own apartment? Does he violate the law if he wears a hearing aid? Does he violate the law if he places a microphone against the wall of his own apartment? Does he violate the law when he sticks this microphone on the wall of his own apartment? Does an officer violate the law by observing the activities of persons from a point outside the physical limits of the property of those persons? Does an officer violate the law if he uses a flashlight (electronic device) to aid him in making such observations? To ask these questions is to answer them. If the evidence collected in such ways cannot be used in criminal prosecutions, then the enforcement of criminal law and the administration of justice in this country will be severely handicapped.

The Supreme Court of Appeals of Virginia, in affirming the judgment of the Corporation Court of the City of Norfolk in passing on the question of whether or not the evidence obtained by the police officer through the use of the microphone should be admitted, stated in its opinion (204 Va. 275, 281) (R. 47):

> "The *Silverman* case is factually different from the case at bar and it is not controlling. Officer Beach was asked if the instrument used was a spiked device and he responded 'Yes, sir; small device.' That is the only description given of it. The uncontradicted evidence is that it was not driven into the wall, but was 'stuck in' it. This is the only evidence as to any penetration of the party wall and it is reasonable to assume that the penetration was very slight such as one made by a thumb tack to hold the small device in place. *The record does not show that the eavesdropping was accomplished through 'an unauthorized physical penetration into*

> *the premises' occupied by defendant.* Thus, we hold that the evidence obtained by means of the listening device did not constitute a violation of the Fourth Amendment to the Constitution of the United States or Section 10 of the Constitution of the State of Virginia, and that it was not error to admit such evidence." (Italics supplied)

In the recent case of *Lopez* v. *United States,* 373 U. S. 427, 83 S. Ct. 1381, 10 L.ed 2d 462 the Court was asked to exclude evidence secured through the use of an electronic device. This Court did permit the recordings of a conversation to be considered in evidence. The recordings were taken down by a tiny wire recorder lodged in the pocket of the detective while he conversed with Lopez in Lopez' private office. The only similarity with the case at bar is that in both cases there was no trespass or unauthorized physical penetration of the defendant's premises, and an electronic device was used. In one case (the case at bar) to amplify the sounds (conversations) and the others (Lopez) to record the conversations.

Chief Justice Warren in a concurring opinion expressed the view (83 S. Ct., at 1389, 10 L.ed 2d 472):

> "I also share the opinion of Mr. Justice Brennan that the fantastic advances in the field of electronic communication constitute a great danger to the privacy of the individual; that indiscriminate use of such devices in law enforcement raises grave constitutional questions under the Fourth and Fifth Amendments; and that these considerations impose a heavier responsibility on this Court in its supervision of the fairness of procedures in the federal court system. However, *I do not believe that as a result, all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods."* (Italics supplied)

In the opinion of the Court, we find this highly sufficient statement (83 S. Ct., at 1387, 10 L.ed 2d 470):

> "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. See, e.g., Olmstead v. United States, 277 U.S. 438, 72 L. ed. 944, 48 S. Ct. 564, 66 ALR 376; Goldman v. United States, 316 U.S. 129, 86 L. ed 1322, 62 S. Ct. 993. It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. Silverman v. United States, supra."

Counsel for the petitioner has misconstrued the meaning of the decision in the *Silverman* case, *supra*. He has described the actual intrusion in that case to be an "electronic intrusion," whatever that term implies. On page 9 of his brief, he states:

> "It is submitted that the 'actual intrusion' found in *Silverman* to qualify under the doctrine of a needed trespass was nothing more or less than an electronic intrusion. I further submit that this electronic intrusion in *Silverman* of the spike mike, *while not an actual physical intrusion,* was in effect a more gross intrusion than that which could have been effected by the physical trespass of an officer. *This is the situation in the instant case.*" (Italics supplied)

In *Silverman,* there was in fact a physical intrusion. The spike penetrated the party wall 7¼ inches and made actual physical contact with a heating duct making the heating duct a giant microphone running through the entire house.

We believe that the decision of the Court in *Silverman* is differentiated from the earlier decisions by the statement made by Mr. Justice Clark and Mr. Justice Whitaker concurring:

> "In view of the determination by the majority that the unauthorized physical penetration into petitioners' premises constituted sufficient trespass to remove this case from the coverage of earlier decisions, we feel obligated to join in the Court's opinion." (365 U.S. 505, 5 L. ed 740)

From the above-quoted language of petitioner's brief, *supra,* counsel for the petitioner admits that there was not an actual physical intrusion into the apartment of the petitioner. However, thereafter, in his brief, counsel argues that there was an intrusion into the apartment of the petitioner. (Brief, pp. 9, 10). The evidence in this case does not bear out this contention. The hearing device used by the officer was not described to any extent. The petitioner assumes that the spike on the device was driven into the wall to the extent that an unlawful trespass was effected. She also assumes that the spike was driven into the common studding to which the wall boards were fastened. There is no evidence of this whatsoever in the record. The evidence does not disclose the character of the wall, whether it was solid or whether it included common studding.

Petitioner seeks to establish the erroneous assumption that the spike attached to the microphone was driven into the common studding from a quotation (on page 9 of her brief) from the work of Dash, Knowlton, Schwartz, "The Eavesdroppers," in its section on tools, page 341, the inference being that the so-called "spike mike" could not pick up the

sounds unless same was driven into the common studding between the wall of the petitioner's apartment and the apartment occupied by Officer Beach and therefore the spike attached to the microphone was actually driven into the common studding. The following correspondence with Dr. Richard F. Schwartz disproves this assumption:

"October 29, 1963

"Dr. Richard F. Schwartz
"Assistant Professor
"Moore School of Electrical Engineering
"University of Pennsylvania
"Philadelphia 4, Pennsylvania

"Dear Dr. Schwartz:

"The writer has examined with great interest the work entitled 'The Eavesdroppers' of which you are a co-author. This office is interested in a case involving the use of electronic equipment where the premises of the defendant were invaded by officers after information was obtained through a hearing device commonly known as a spiked mike which was 'stuck' on a wall. On page 341 of your book you describe the use of 'contact mikes' and state that their use is limited to where the spike is driven into the common column to which the lathe or wall board is fastened. In your work you do not describe the so-called detectophone which the writer understands is leaned against the wall and can detect a conversation carried on in a adjoining room. Is there any difference between this and the spiked mike where the spike is not driven into the common studding?

"With high regards and best wishes, I am

"Sincerely yours,

"/s/ D. Gardiner Tyler
"Assistant Attorney General"

DGT:MVH

"31 October 1963

"Mr. D. Gardiner Tyler
"Assistant Attorney General
"Commonwealth of Virginia
"Office of Attorney General
"Richmond, Virginia

"Dear Mr. Tyler:

"This is in reference to your letter of 29 October 1963 concerning eavesdropping with a concealed microphone.

"I have heard the term 'detectophone,' but I do not personally know how it is similar to or different from other types of wall microphones. The main point I was making in my work of several years back was that the presence of a 'dead' air space between walls might hinder the transmission of sound to a microphone located on the side opposite to the source of sound. It is impossible to say that this would always prohibit any sound transmission. Nevertheless, the 'cushioning' of an air pocket would be largely negated if common studding were used. If a situation did exist where a spiked microphone was ineffective, it is very likely that any other type microphone would be equally ineffective.

"I trust this answers your question. If there is any other way I may help you, please do not hesitate to write.

"Very truly yours,

"/s/ Richard F. Schwartz
"Associate Professor of
"Electrical Engineering"

RFS:sbb

From what Dr. Schwartz states, a "spike mike" would not be prohibited from picking up sounds through a common wall if in fact it was not driven in a common studding.

Counsel for petitioner on page 10 of his brief attempts to distinguish between the detectophone used in the *Goldman* case, *supra,* and the "spike mike" used in the *Silverman* case, *supra,* by stating that the former merely amplifies while the latter intrudes electrically. There is nothing in the record from which the Court could draw this conclusion. Dr. Schwartz' letter implies that the detectophone and the "spike mike" are both types of wall microphones.

The Oxford Universal Dictionary, Third Edition, defines the term "microphone" to be:

> "An instrument by which small sounds can be intensified."

The term "detectophone" is not found in that work. Had these instruments possessed different properties, it is rather strange that Dr. Schwartz would not have been aware of them, especially when the work *"The Eavesdroppers,"* Cash, Knowlton and Schwartz, covered not only the scientific aspects of eavesdropping but also the legal aspects thereof. In fact, the *Goldman* case is cited and described therein.

Counsel for the petitioner cites the dissenting opinion in the *On Lee* case (342 U. S. 747) in which Mr. Justice Burton equates the seizing of tangible effects with the "picking up" of words, implying that the electronic instrument actually penetrates the premises and *there* picks up the words. We do not believe that this is the situation at all. When words are spoken, they produce sound waves in the atmosphere. These waves when detected by the human ear are translated so as to be understood by the listener. The sound waves come to the ear—the ear does not go to the original spot from which the waves emanate. The microphone is more sensitive than the human ear.

All the microphone does is to amplify the sounds already in the atmosphere to such an extent that the same may be detected by the human ear. Words are picked up *at the* location of the microphone. We do not believe that a line can be drawn between the magnifying instruments and other such electronic devices, to which counsel for the petitioner refers, from a legal standpoint. The distinction is too fine.

We submit that this Honorable Court should reaffirm its position that in order to constitute an unreasonable search under the Fourth Amendment, there must be a showing that there was an unauthorized physical penetration into the premises of the accused.

II.

There Was No Unreasonable Search, Electronically or Otherwise

If there were an actual physical penetration into petitioner's apartment accomplished by means of the so-called "spike mike" (as contended by counsel for petitioner and denied by us) would this constitute an unreasonable search within the meaning of the Fourth Amendment?

The Supreme Court of Appeals of Virginia considered the pertinent provisions of the Virginia Constitution as well as the provisions of the Fourth Amendment in rendering its opinion in this case.

Section 10 of the Virginia Constitution is as follows:

> "That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievious and oppressive, and ought not to be granted."

The Fourth Amendment to the Constitution of the United States is as follows:

> "The right of the people to be secured in their persons, houses, papers and effects against *unreasonable* searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (Italics supplied)

As the privacy of an individual and the sanctity of his home is one of the fundamental bulwarks upon which this Republic was founded, we find that the courts have literally decided hundreds and hundreds of cases involving this subject. It has long been recognized by this Honorable Court that reasonable searches and seizures are permitted.

In *United States* v. *Rabinowitz*, 339 U. S. 56-86, the Court stated:

> "It is unreasonable searches that are prohibited by the Fourth Amendment. Carroll v. United States, 267 US 132, 147, 69 L ed 543, 548, 45 S Ct 280, 39 ALR 790. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required."

Likewise, consider Searches and Seizures and Immunities, Varon Volume 1, page 113:

> "In the Carroll case, *supra* [Carroll v. United States, 267 U.S. 132, 69 L. Ed. 543, page 555] the court, in considering the general reputation of an accused as an element in determining probable cause, said:

> " 'They knew, or had convincing evidence to make them believe, that the Carroll boys, as they called them, were so-called "bootleggers" in Grand Rapids,—i.e., that they were engaged in plying the unlawful trade of selling such liquor in that city.' "

How then may probable cause be determined?

In the recent case of *Draper* v. *United States,* (1958) 358 U. S. 307, 3 L. Ed. (2d) 327, the Court set forth the criteria which governs the determination of probable cause. We quote from the opinion:

> " 'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' Brinegar v. United States, supra (338 US at 175). Probable cause exists where 'the facts and circumstances within [the arresting officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. Carroll v. United States, 267 US 132, 162, 69 L ed 543, 555, 45 S Ct 280, 39 ALR 790."

In the recent case of *Ker* v. *California,* 374 U. S. 23, 83 S. Ct. 1623, June, 1963, the police officers made a search without a search warrant. The question to be determined was whether the evidence obtained by virtue of the search should be excluded. The Court held that the search must be incident to be a lawful arrest and the lawfulness must be based upon probable cause. The Court stated (83 S. Ct. 163, 10 L. Ed. (2d) 726, 739):

"The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the arrest without warrant, in turn, must be based upon probable cause, which exists 'where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' Brinegar v. United States, 338 U.S. 160, 175, 176, 93 L. ed 1879, 1890, 69 S. Ct. 1302 (1949), quoting from Carroll v. United States, 267 U.S. 132, 162, 69 L. ed 543, 555, 45 S. Ct. 280, 39 ALR 790 (1925); . . . ."

A search without a warrant is lawful. Again referring to the separate opinion in the *Ker* case (10 L. Ed. 726, 742), 83 Sup. Ct. 1631, 1634, we find this statement:

"The doctrine that a search without warrant may be lawfully conducted if incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures. See Marron v. United States, 275 U.S. 192, 72 L ed 231, 48 S. Ct. 74 (1927); Harris v. United States, 331 U.S. 145, 91 L ed 1399, 67 S. Ct. 1098 (1947); Abel v. United States, 362 U.S. 217, 4 L ed 2d 668, 80 S. Ct. 683 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Cal. L Rev. 474, 490-493 (1961). The cases have imposed no requirement that the arrest be under authority of an arrest warrant, but only that it be lawful. See Marron v. United States, supra (275 U.S. at 198, 199); United States v. Rabinowitz, supra (339 U.S. at 61); cf. Agnello v. United States, 269 U.S. 20, 30, 31, 70 L ed 145, 148, 46 S. Ct. 4, 51 ALR 409 (1925)."

This Court has held in cases involving constitutional rights that an independent examination of the record will be made so the Court can determine for itself whether the Constitution has been violated. *Ker* v. *California, supra.* We have heretofore in this brief quoted at length from the record and summarized the evidence in connection with the circumstances leading up to the arrest of the petitioner and the entry of the police officers into her apartment where they arrested a man and a woman preparing for sexual intercourse.

Let us now examine the evidence in detail, narrating the facts and circumstances known by the police officers which justified them in having probable cause to believe that the petitioner was committing a crime immediately before and during the time the search was made. The evidence shows that petitioner had operated houses of ill-fame in Norfolk and also in Richmond. See, the testimony of Katherine Taylor (R. 10, 11, 18); testimony of Helen Buckridge (R. 23) and that of S. M. Edwards (R. 43). Both Taylor and Buckridge had heard petitioner say that she wanted to make money in order to pay a $1,000 fine. The Supreme Court of Appeals of Virginia drew the following conclusion from the testimony of Helen Buckridge and Katherine Taylor (R. 44):

> "The testimony of Helen Buckridge and Katherine Taylor clearly established that the defendant had formerly operated such an illicit business."

It would be quite naive to say that the Norfolk police authorities did not know of petitioner's activities in the field of prostitution when they directed Officer Beach to make a surveillance of her apartment.

Officer Beach knew that the petitioner had rented this apartment in an assumed name. He had been directed by the Norfolk police authorities to keep a surveillance on the apartment. (R. 28). During the first day of the surveillance, October 21, 1961, accomplished from a car parked in the street, he observed the petitioner in the apartment and saw her leave it. Between 11 a.m. and 3 p.m. he observed Katherine Taylor and Betty Johnson going in and out of the apartment. He also observed during the same period two white men enter and emerge from the apartment. (Record 29, 31). These men were there at different times. Petitioner's husband also entered and emerged from the apartment several times during the day. At 3:40 p.m. the petitioner left the apartment.

By that time (before using the spike mike), Officer Beach had just reason to believe that a crime had been committed by the petitioner. What crime? The violation of Section 18.1-205 of the Code of Virginia (1950), as amended, in that the petitioner who had rented the apartment under an assumed name had placed a female therein for the purpose of prostitution. Probable cause warranting arrest and seizure exists where the facts and circumstances within the arresting officers' knowledge and which they had reasonable trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been committed or is being committed. *Draper* v. *United States, supra, Ker* v. *California, supra.* Hence, Officer Beach, had he elected to do so, could have entered the apartment at one P.M., October 23, seeking to arrest the petitioner and to make a search thereof without the necessity of a search warrant. Having the right to enter the apartment and make the arrest, it would logically follow that he had the right to

make an actual intrusion by electronic means or otherwise to obtain evidence (of course, we deny any intrusion, actual or otherwise, was made) and this would not have been an unreasonable search within the meaning of the Fourth Amendment as this Court has construed it. Comparing the case at bar with the *Ker* case, *supra*, we submit that Officer Beach before he used the so-called spike mike had sufficient knowledge of the maintenance of a house of prostitution by the defendant to justify making an entry and search in the defendant's apartment as did the police officer in the *Ker* case, *supra*, when he used the pass key and entered Ker's apartment. Again, comparing the facts and circumstances in the case at bar with those of the *Draper* case, *supra*, we submit there were facts and circumstances here sufficient in themselves to warrant a man of reasonable caution in the belief that an offense was being committed by the petitioner when the alleged intrusion or search by electronic means was effected.

If ever there was a case where the police officers knew and had just cause to believe that an offense was being committed or had been committed giving rise to probable cause, it is this case.

The law of Virginia is clear on the subject of the authority to make an arrest without a warrant. After reporting many authorities in the case of *Byrd* v. *Commonwealth*, 158 Va. 897, 900, the Court stated (p. 902):

> "From this it appears that an arrest without a warrant is lawful, (1) where a felony has been committed, (2) where it is being committed, (3) when it is about to be committed, (4) when a misdemeanor is committed in the presence of an officer, and (5) where a breach of the peace is imminent."

Considering all the facts and circumstances of the case, certainly the officers were justified in making the arrest of the petitioner on October 25, 1961, and as an incident thereto had the authority to enter her apartment and observe what was transpiring there.

Having the right to make a search of the petitioner's apartment, the police officers could make the alleged search by means of a spike mike. The evidence thereby obtained could be properly admitted in a criminal prosecution.

III.

Petitioner Using Her Apartment For An Illegal Purpose Not Entitled To Protection Under The Fourth Amendment

As important as the right of privacy is, is it not subordinate to the rights of society? Has not society the right and duty to protect itself from wrongdoers? So long as a person obeys the law of the land, he is entitled to his privacy and is entitled to protection of the Fourth Amendment. However, he waives this protection if he engages in illegal activities.

This proposition is aptly stated by the Circuit Court of Appeals in the case of *United States* v. *Goldman, supra*:

> "Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener . . ." (118 F. (2d) 310)

In the case of *Lanz* v. *New York,* 370 U. S. 129, 8 L. Ed. (2d) 384, this Court expressed the view that "without attempting either to find or protect the ultimate scope of the Fourth Amendment's protection, it is obvious that a jail shares none of the attributes of the privacy of a house, an automobile, an office or a hotel room."

By the same token, an apartment not occupied as a home or dwelling place but rented for the sole purpose of maintaining a house of prostitution shares none of the attributes of privacy which fall within the scope of protection afforded by the Fourth Amendment. In this connection, it should be borne in mind that the petitioner did not use this apartment as a home. She resided on Onley Road, Norfolk, Virginia (R. 12), and later on on Sewell's Point Road (R. 14).

Why should the government or a State pamper a law violator under the guise of a constitutional right? Surely, the founding fathers or anyone else never contemplated that the Fourth Amendment was to be used for the purpose of harboring criminals, e.g., those individuals who deliberately flaunt the dictates of society.

IV.

Evidence Obtained By Use Of Electronic Means Should Not Be Excluded In A Criminal Prosecution

The question of whether the use of electronic equipment should be proscribed was before the Court in the *Lopez* case, *supra*. The Court there permitted the statements of Lopez made to a police officer in Lopez' office which were recorded on a tiny recording device admitted into evidence. The Chief Justice stated in a concurring opinion:

> "I do not believe . . . all uses of such devices should be proscribed either as unconstitutional or as unfair law enforcement methods."

Society should not be deprived of the use of modern scientific means to protect itself against those who elect to disobey its laws. We submit that it is reasonable and

proper that evidence obtained through the use of electronic equipment should not be excluded in criminal prosecutions.

V.

The Evidence Sought To Be Excluded Did Not Contribute To The Conviction

The evidence, consisting of conversations of petitioner with others in the apartment which were overheard by Officer Beach did not contribute to the conviction of petitioner. Since this case reached this Court, the case of *Fahy* v. *Connecticut* has been decided (December 2, 1963). In that case, the Connecticut Supreme Court, 149 Conn. 577, 183 Atl. (2d) 256, has affirmed a conviction notwithstanding that a portion of the evidence should have been excluded, the same having been illegally secured. This was in accordance with the ruling in *Mapp* v. *Ohio,* 367 U.S. 643. In other words, the Connecticut Court held that it was harmless error to admit such evidence. Of course, the case at bar differs from the *Mapp* and *Fahy* cases as the Virginia Supreme Court did not determine that the evidence was illegally secured. This Court in the *Fahy* case decided to review the facts and determine for itself that such evidence might have contributed to the conviction. It so held, because the conviction of *Fahy* was brought about by confronting him with the black paint and paint brush which were the fruit of the illegal search. This Court in the case of *Stoner* v. *California,* 32 U.S. Law Week 4227, decided March 23, 1964, after ruling that the search of the hotel room of the accused (he being arrested four days later many miles away) was illegal and, therefore, the evidence acquired therefrom was inadmissible, ordered that the case be retried. The Court reasoned that the articles seized in the search were essential evidence to identify

the accused and, therefore, there was a reasonable possibility that the improper evidence contributed to the conviction. The case at bar is entirely different from the *Fahy* case and the *Stoner* case, both factually and otherwise.

AS HERETOFORE STATED, WE FEEL THAT THERE WAS NO VIOLATION OF THE FOURTH AMENDMENT AND THE TESTIMONY OF OFFICER BEACH RELATING TO THE CONVERSATIONS HE HEARD WAS PROPERLY ADMITTED INTO EVIDENCE. HOWEVER, WE BELIEVE THAT THE PHASE OF THE CASE DEALING WITH THE SUFFICIENCY OF THE EVIDENCE SHOULD BE ARGUED.

Let us consider in detail the charges upon which the petitioner was tried and convicted.

(a) The first count of the indictment is as follows:

> The Grand Jurors of the Commonwealth of Virginia in and for the body of the City of Norfolk and now attending the said Court, at its December term, 1961, upon their oaths, present that Catherine Clinton, alias Katherine Clinton to-wit on the 25th day of October in the year 1961, and other days within two weeks next prior thereto, in the said City of Norfolk feloniously did knowingly receive money from the earning of one Katherine R. Taylor, a female, then and there engaged in prostitution, the said money so received as aforesaid not being for a consideration deemed good or valuable in law, in violation of Title 18.1-208 of the Code of Virginia of 1950, as amended, in (fol. 4) such cases made and provided, against the peace and dignity of the Commonwealth of Virginia (R. 3).

There is not one word concerning the apartment, that is the house of prostitution, mentioned in this count. The evidence which petitioner seeks to have this Court rule as illegally obtained and, therefore, inadmissible consists of conversations and noises overheard by Officer Beach allegedly through the means of the microphone. We have placed a resume of the same in the appendix of this Brief. An examination of this will not disclose that Katherine R. Taylor was mentioned nor was she in the apartment when any of this conversation took place. Furthermore, there is not a single word in the conversation that indicates that petitioner had received any money from the earnings of Katherine R. Taylor nor from any other person engaged in prostitution. This count in the indictment was proven by the testimony of Katherine R. Taylor herself (R. 9 through 21 inclusive), who appeared as a witness for the Commonwealth and by the testimony of Helen Buckridge. Both of these witnesses stated that the charge for paid dates, that is for sexual intercourse, was ten dollars ($10) of this amount five dollars ($5) was paid petitioner. Katherine R. Taylor stated that she had participated in such activities seven or eight times (R. 14). Helen Buckridge was introduced to the petitioner by Katherine R. Taylor and the three talked over arrangements (R. 23). She was at the apartment between 5:00 P.M. and 10:00 P.M. on two or three occasions, but only filled one paid date (R. 24).

In the opinion of the Supreme Court of Appeals of Virginia, the Court took cognizance of the fact that "the jury found the defendant guilty as charged under the first count and fixed her punishment at five years imprisonment and a fine of five hundred dollars ($500)" (R. 40, 41). It will be noted that this punishment does not exceed the punishment prescribed in Section 18.1-208 of the Code of

Virginia of 1950, as amended, which is the term of imprisonment of not less than one year nor more than ten years and a fine of not more than five hundred dollars ($500).

It has been held by this Court that when a general verdict is rendered on all counts of the indictment that such verdict should stand if anyone of the counts is good. In the case of *Evans* v. *United States,* 153 U. S. 608, 38 L. ed. 839, 14 Sup. Ct. Rep. 939, the Court had this to say:

> "As the verdict of guilty was rendered upon all counts, and the sentence did not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good if any such count is found to be sufficient."

Likewise, the Court followed the same ruling in the case of *Abrams* v. *United States,* 250 U.S. 616. We quote from the Court's opinion:

> "A question of law is thus presented, which calls for an examination of the record, not for the purpose of weighing conflicting testimony, but only to determine whether there was some evidence, competent and substantial, before the jury, fairly tending to sustain the verdict. Troxell v. Delaware, L. & W. R. Co. 227 U.S. 434, 442, 57 L. ed. 586, 590, 33 Sup. Ct. Rep. 274; Lancaster v. Collins, 115 U.S. 222, 225, 29 L. ed. 373, 374, 6 Sup. Ct. Rep. 33; Chicago & N.W.R. Co. v. Ohle, 117 U.S. 123, 129, 29 L. ed. 837, 839, 6 Sup. Ct. Rep. 632. We shall not need to consider the sufficiency, under the rule just stated, of the evidence introduced as to all of the counts of the indictment, for, since the sentence imposed did not exceed that which might lawfully have been imposed under any single count, the judgment upon the verdict of the jury must be affirmed if the evidence is sufficient to sustain any one of the counts. Evans v. United States,

153 U.S. 608, 38 L. ed. 839, 14 Sup. Ct. Rep. 939; Claassen v. United States, 142 U.S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169; Debs v. United States, 249 U.S. 211, 216, ante, 566, 569, 39 Sup. Ct. Rep. 252." (250 U. S. 619, 63 L. ed. 1176)

The Supreme Court of California recently had occasion to rule in a likewise situation. In the case of *People* v. *Tarantino*, 290 P. (2d) 505 (Cal.), evidence was obtained by the use of a microphone hidden in the defendant's office by the police. The Court had ruled shortly before in *People* v. *Cahan*, 44 Cal. (2d) 434, 282 P. (2d) 905 (1955), that such evidence could not be used. The prosecution contended that the admission of the evidence did not result in a miscarriage of justice, there being sufficient evidence independent of that obtained through the means of the mircrophone. In passing on this point, the Court stated:

> "As to Count 2 it appears to us that the evidence, entirely independent of that illegally obtained, convincingly, if not overwhelmingly, establishes guilt, and, for the reasons hereinafter more particularly stated, we conclude that the verdict on this count should not be disturbed."

We urge the Court to apply the same principle as it did in the *Evans* and *Abrams* cases, *supra*. If this is done, the result is inescapable that the judgment of the Virginia Supreme Court of Appeals, in affirming the conviction, was correct as there can be no doubt that the guilt of the accused was established by competent evidence. Furthermore, there is no necessity to consider any other phase of this case.

(b) The second count of the indictment is found on Page 3 of the Record.

This count charged the petitioner with the violation of Section 18.1-205 of the Code of Virginia in that she placed Katherine R. Taylor in a house of prostitution. It will be noted that the penalty under this section (18.1-205) is a fine of not less than one thousand dollars ($1000) and imprisonment for not less than one year nor more than ten years. The punishment fixed by the jury is well within the limits prescribed by said statute. In fact, the fine of five hundred dollars ($500) assessed was less than the fine prescribed in Section 18.1-205. The Supreme Court of Appeals stated in its opinion that the jury found the defendant guilty as charged under the first count (R. 40 and 41). Be that as it may, we are convinced that the evidence was sufficient to establish the guilt of the defendant under the second count.

If the Court will examine the testimony of Officer Beach (R. 28 through 40 inclusive), with the exception of the evidence sought to be excluded (set forth in the Appendix), the testimony of Porter (R. 7 and 8), of Edwards (R. 9, 42 and 43), of Katherine R. Taylor (R. 9 through 21 inclusive) and of Helen Buckridge (R. 22 through 28 inclusive), it will see that the evidence convincingly and overwhelmingly establishes the guilt of the petitioner on the second count. If the Court will follow its former rulings, that is, determine whether there was some evidence competent and substantial before the jury fairly tending to sustain the verdict (*Abrams* v. *United States, supra*) then it will necessarily sustain the verdict in the case at bar. All of this evidence above referred to was competent and substantial, in fact, it was overwhelming.

We submit that there is no reasonable possibility that by excluding the alleged improper evidence (conversations overheard) would have changed the jury's verdict on either count of the indictment.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment entered by the Supreme Court of Appeals in this case should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have forwarded a copy of the foregoing Brief to Calvin H. Childress, Esq., 342 Law Building, Norfolk 10, Virginia, Counsel of Record for the petitioner, by depositing the same in a United States post office mail box, with first class postage prepaid, addressed to said Counsel of Record for the petitioner, at his post office address hereinabove set forth, on this 3rd day of April, 1964.

D. GARDINER TYLER
Assistant Attorney General

APPENDIX

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Code of Virginia (1950), as amended:

"§18.1-205.—Any person who shall place any female in the charge or custody of any other person or persons for immoral purposes, or in a house of prostitution, with the intent that she shall live a life of prostitution, or any person who shall compel any female to reside with him, or with any other person for immoral purposes, or for the purposes of prostitution, or compel her to live a life of prostitution, shall be guilty of pandering, and shall be punished by a fine of not less than one thousand dollars and by confinement in the penitentiary for not less than one year nor more than ten years."

"§18.1-208.—Any person who shall knowingly receive any money or other valuable thing from the earnings of any female engaged in prostitution, except for a consideration deemed good and valuable in law, shall be guilty of pandering, and on conviction be confined in the penitentiary not less than one year nor more than ten years, and fined not more than five hundred dollars."

RESUME OF CONVERSATIONS HEARD BY OFFICER BEACH WHILE MAKING SURVEILLANCE OF THE PETITIONER'S APARTMENT

October 21, 1961

The surveillance commenced on October 21, 1961. It was made on that date some distance from the petitioner's apartment from a car in the street and therefore there were no conversations heard.

October 23, 1961

At 1:00 P.M. the phone rang and a woman stated that she had gone to the store. At 1:20 P.M. the phone rang and a woman answered it. She had hung up,

she turned around and told another woman in the apartment that a man in a green and white station * * * interrupted by counsel (R. 31). At 1:30 P.M. the woman answered the phone and hung up. She told the other woman * * * interrupted by counsel (R. 32). At 3:05 P.M. Catherine Clinton arrived at the apartment, she answered the phone (3:18 P.M.) and told the party on the other end, she said, "No, Honey. We had one and he was Shore Patrol." At 3:30 P.M. the phone rang and Catherine Clinton answered it and told the party on the other end "Make it as early as possible as she has to go home." At 4:25 P.M. a white man came in the apartment. He asked for a girl to come to his apartment. He told the woman he was talking to that he would * * * interrupted by counsel (R. 33). This man stated that he would be in his apartment in thirty minutes and wanted a woman. Catherine Clinton said that she would send her around (R. 33).

October 24, 1961

At 1:07 P.M. I could hear shoes hit the floor and it wasn't long after that that there was a—well, there was a daybed, a sort of a sofa, in the apartment—and I could hear movements on that and I could hear the springs on the sofa squeaking. At 2:25 P.M. Catherine Clinton arrived. She was told by one of the women in the apartment, the girl said, "Bob Merritt called and I told him you would be here at 3 or 3:30 at the latest." At 2:28 Catherine Clinton answered the phone and stated to the party, "Glad you called. I was going to send you home in a cab the other night. Things are slowing down but we are managing to keep our heads above water. Things will be set up for tomorrow night." At 2:44 P.M. Catherine Clinton answered the phone and said, "You be here at 5:00 o'clock." She said, "I have something working so all of us will have work."

About five minutes after that Catherine Clinton dialed the phone and asked the party, she inquired about an apartment and how much the rent was (R. 34). At 3:27 P.M. Catherine Clinton answered the phone and she says, "I don't know a Bob Merritt." Then she paused and said, "What Mr. Cohen?". Then she paused again and she said, "You have Charlie Cohen call me and then you call back." At 3:30 P.M. Catherine Clinton, after talking to a party over the phone stated to the other woman in the apartment, "Helen called and will be over at 5:00 o'clock." At 3:40 P.M. Catherine Clinton told a white man (her husband), who had just entered that Bob Merritt had called and said, "Charlie Cohen told him to call." Harry Clinton became very excited and said, "Get to the phone and call Charlie and see if he did tell this man to call." At 3:47 P.M. Catherine Clinton used the phone and asked for Charlie Cohen. She hung up and told the people in the apartment that he was out. At 3:49 P.M. the phone rang. Catherine Clinton answered it and she said, "Where are you, Mr. Cohen?" Then she paused and then she said, "You are not Charlie Cohen." She paused again and she said, "I will have to talk to you in person." At 4:00 P.M. the phone rang, Catherine Cinton answered it and said, "Charlie, are you at the store?" She paused and said, "If you give this number out," and she paused again and then she said, "O.K., but always call me first. If he will call, I will be glad to talk to him." (R. p. 35)

October 25, 1961

At 10:45 A.M. you could hear the man and the woman up against the wall where the sofa was and everything got quiet and all you could hear were springs on the day bed squeaking.

Note: In this summary we have used the language of Officer Beach as it appeared in the testimony.